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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

IN THE MATTER OF
THE APPLICATION OF JOHN PARKER
FOR A WRIT OF HABEAS CORPUS

JOHN PARKER,

Petitioner,

vs.

STATE OF SOUTH DAKOTA and
DON R. ERICKSON, Warden,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The respondents pray that the Petition for Writ of Certiorari to review the opinion and Judgment of the United States Court of Appeals for the Eighth Circuit rendered on March 23, 1970, be in all respects denied.

OPINIONS BELOW

The opinion submitted by Petitioner entitled "Exhibit A through D" appear to be quite adequate.

JURISDICTION

Statement of counsel for Petitioner appears to be a fair statement of the statute he is proceeding under.

CONSTITUTIONAL PROVISIONS

Article VI, §7, South Dakota Constitution:

> In all criminal prosecutions the accused shall have the right to defend in person and by counsel; to demand the nature and cause of the accusation against him; to have a copy thereof; to meet the witnesses against him face to face; to have compulsory process served for obtaining witnesses in his behalf, and to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

Article VI of the first ten Amendments to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

QUESTION PRESENTED

Was the Petitioner John Parker denied the effective assistance of counsel as is guaranteed by Article VI, Section 7 of the South Dakota Constitution and the Sixth Amendment to the United States Constitution?

STATEMENT OF THE CASE

The Respondent herein will use like designations with the Petitioner's counsel and all references hereafter to State will mean the Respondent and references to Parker will mean John Parker, Petitioner, herein.

The State will also use the same manner as counsel for Parker with reference to the record, to-wit: (A) Transcript of Arraignment; (HC) Transcript of initial Habeas Corpus hearing in the State Court; (FHC) Transcript of Habeas Corpus in Federal Court.

The State offers its own statement of the case for the obvious reasons.

Parker was arrested on November 1, 1950 on a charge of murder in Brookings County, South Dakota. On November 4, 1950, Parker appeared before a justice of the peace on that charge. At that time he was not represented by counsel and at said appearance he did then and there demand counsel. On November 6, 1950, with assistance of counsel, Mr. Walter Aaberg, Parker waived preliminary hearing and on the same date appeared before Judge W. W. Knight in Circuit Court in and for the County of Brookings, State of South Dakota, Third Judicial Circuit, and entered a plea of guilty following which plea Parker was sentenced to life imprisonment. (A 1-22)

All other statements offered by counsel for Petitioner are based upon statements of Parker himself at the State Habeas Corpus Proceeding held in 1952 or are pure suppositions

of counsel for Parker.

ARGUMENT

Was the Petitioner John Parker denied effective assistance of counsel as is guaranteed by Article VI, Section 7 of the South Dakota Constitution and the Sixth Amendment to the United States Constitution?

This writer firmly agrees with cases cited by counsel for Parker of *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Von Molke v. Gilles*, 332 U.S. 708, 68 S. Ct. 316, 92 L. Ed. 309 (1948), and *Crooker v. California*, 357 U.S. 433, 78 S. Ct. 1287, 2 L. Ed. 2d 1448 (1958) wherein they respectively require effective assistance of counsel at all stages of the proceeding, Parker had just that; where they require counsel even in the case of a guilty plea, Parker had just that; and finally, where they require it to be counsel of the defendant's own choice and here Parker selected an attorney he had used before on other

matters showing his confidence therein.

The argument by counsel for Parker in support of the affirmative answer to the question of violation of constitutional rights is based almost entirely on the following ideas, to-wit: (1) Walter Aaberg (Parker's trial attorney) was inadequate because, (a) he lacked experience, (b) he made no investigation and his appearance was therefore perfunctory. (2) There was direct interference with Parker's efforts to obtain other counsel.

Let us consider these ideas individually. First, was Parker denied effective assistance of counsel due to the alleged lack of experience of Aaberg, his trial attorney?

Parker's counsel claims he was, and for one reason and one reason only, because he found only five previous criminal cases attributable to Aaberg in Brookings County, South Dakota.

The State feels that the words of Judge Lay of the Eighth Circuit Court of Appeals in this

very case carefully puts this argument to rest;

> Nowhere does Parker assert that he was misled by counsel or given improper advice. Parker's claim of inadequacy of counsel rests upon his attorney's prior inexperience and his naked statement that the lawyer did not investigate the facts or properly advise him. Nowhere does Parker even assert that his plea of guilty was not voluntarily made. As indicated, there must be a showing of cause and effect, i.e. that the inadequacy of counsel contributed in some manner to an involuntary guilty plea. The record does not contain any suggestion of threats or promises made to the defendant in order to induce the plea of guilty. Cf. Machibroda v. United States, 368 U.S. 487 (1962) The fact that the defendant's counsel has not tried many criminal cases cannot be the key to unlock the prison door. In order to sustain a claim of ineffective counsel there must be an affirmative factual basis demonstrating counsel's inadequacy of representation. Unless Parker's conclusatory statements may be fully credited as being true, there exists no evidence to sustain the claim of ineffective assistance of counsel. In the Matter of John Parker on Habeas Corpus U. S. Circuit Court of Appeals, Eighth Circuit, March 23, 1970 (unreported).

In addition to the words of Judge Lay, it should be noted that the evidence offered by Parker is not conclusive as Brookings County is only one of many counties in South Dakota, because there is no showing whatsoever that Walter Aaberg was not an effective counsel in many civil cases and because participation itself does not necessarily make a good lawyer. This, in addition to the fact that Walter Aaberg is deceased and can no longer offer rebuttal testimony. The Court said in *Williams v. Beto*, 354 Fed 2d 698, 704, 5th Cir. 1965:

> . . . Ineffective assistance of counsel should not be sustained unless it very clearly appears well grounded.
> . . .

A lawyer is required to do only his best and the Court in the Beto case said further that:

> . . . The client has no right to complain of the absence of a miracle . . . Williams v. Beto, supra.

Therefore, it is the contention of the State that there is no showing that Parker's trial coun-

sel advised him in such a manner as to make Parker plead guilty when he was not or should not have thereby becoming ineffective counsel.

Second, was Parker denied effective assistance of counsel because of an alleged lack of investigation?

In support of this idea, Parker offers only the naked statement that his lawyer did not investigate.

The State contends that if this statement was made with others at a habeas corpus proceeding in the State of South Dakota in Circuit Court thereof, in the year 1952, many of the other statements made at the same time and by the same man were so patently ridiculous that no one in his right mind would ask anyone to believe them. For example, Parker would have you believe that he accidently shot his wife. (She had four bullet holes in her from a single shot .22 and the body was buried in the basement). This lie was just one of the several obvious ones and

there is no question in my mind that the Judge who heard that testimony considered it a pack of lies. Now Mr. Parker's counsel would have us choose from Parker's testimony of that day a select few conclusory statements and credit them fully. This cannot be, but this is the only showing of a lack of investigation by Aaberg. We do know from the record that Walter Aaberg spent a considerable amount of time with the Defendant in the four days intervening from the time of the arrest until the time of the guilty plea.

Therefore, it is the contention of the State that there is no showing whatsoever that Walter Aaberg did not, in fact, investigate every facet of this case and conclude with the widsom of Solomon that a jury trial and a possible death penalty were too great a risk when life imprisonment was being offered with the plea of guilty.

Let us now consider the idea of counsel for

Parker that there was direct interference with Parker's efforts to obtain other counsel.

Once again, we have a claim based solely upon the testimony of Parker himself in the 1952 South Dakota State habeas corpus proceeding mentioned and discussed just prior hereto. This writer sees no reason to repeat the argument again with reference to whether or not full credit should be given to the conclusory statements offered by John Parker at that hearing.

This Court's attention is drawn to the very succinct statement of Judge Lay of the Eighth Circuit Court of Appeals in this very case wherein he said:

> The 1952 transcript of the State habeas corpus hearing was the sole basis upon which the Federal District Court based its findings. In a Federal habeas corpus proceeding under 28 USC Par 2254(d) as amended, (supp. 1959-67) it is provided that the state court's determination of a factual issue 'shall be presumed to be correct' unless the applicant establishes a circumstance therein enumerated which proves the unreliability of the state proceeding. See United

States ex rel, Thomas V. Maroney, 406 F 2d 992 (3 Cir. 1969); Maxwell v. Turner, 411 F 2d 805 (10th Cir. 1969); Heyd v. Brown, 406 F 2d 346 (5th Cir. 1969); Maes v. Patterson, 401 F 2d 200 (10th Cir. 1968) Woodington v. Mathews, 401 F 2d 125 (7th Cir. 1968); Justus v. New Mexico, 378 F 2d 344 (10th Cir. 1967); Midgett v. Warden, 329 F 2d 185 (4th Cir. 1964). There exists here no contention that the 1952 state proceeding was not a full, fair and adequate hearing or that it, in any way, failed to meet the standards as set forth in Par. 2254(d)(1-8). Cf. Hawkins v. Bennett, ___F 2d ___(1 , March ___1970); Roach v. Bennett, 392 F 2d 743 (8th Cir. 1968). The Federal District Court in fact relied upon the exact testimony taken in the state proceedings. The Federal District Judge made no findings that the 1952 state court factual determination was *not* supported by the record. Under these circumstances, 'the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous'. See Par. 2254(d). This burden was not satisfied.

Judge Lay in this very case went on in further consideration of this matter and said:

Once a state court has conducted a post-conviction proceeding and there exists no deficiency as set forth in Par. 2254(d) (1-8), the

> Federal Court should be extremely reluctant to disturb the sensitive balance of Federal state comity by review of a state court's determination of disputed facts. If all constitutional requirements are met, and there exists no state misconception of federal rights, then the congressional purpose under the act is to require 'convincing evidence' before a state finding of fact may be set aside. Of course, the presumptive correctness of the state finding is always rebuttable. See Brown, v. Crouse, 399 F 2d 311 (10th Cir. 1968). However, the convincing evidence necessary to demonstrate that the state court's findings were erroneous is totally absent here.

Parker would have us conclude that counsel failed to provide minimum standards of assistance. However, the record shows Walter Aaberg conferred with Parker several times (HC 5-10) and the remaining testimony as to what Walter Aaberg did or did not do is pure conjecture, as Parker who had testified as to numerous things had no first hand knowledge whatsoever what Walter Aaberg might or might not have done when he was not in attendance with him. The courts have

held in *Williams v. Beto*, supra, in setting forth the requirements of counsel that:

> . . . It was pointed out that the assistance of counsel included consultation and understanding of the accused's case . . .

And there is no showing here whatsoever that Parker did not have the consultation and that Walter Aaberg did not understand the accused's case.

Cognizance and consideration should be given the holding and the words of the Supreme Court of South Dakota hearing this very matter on the same record when they stated in *State ex rel Parker v. Jameson*, 61 NW 2d 832 (S.D. 1953):

> In the case at bar a duly licensed and practicing lawyer of Brookings, South Dakota, appeared with and for appellant at the time he was sentenced. The record reveals that in the preliminary part of the proceeding in which appellant ordered his plea of guilty, he answered a question directed to him by the presiding judge as to whether the attorney present was appellant's attorney, and other questions, as follows:

A. Yes, he is.

Q. I assume that he has fully informed you of all your rights?

A. Yes.

Q. Your right to a trial by jury?

A. Yes.

Q. Your right to be confronted by the witnesses against you?

A. Yes he has.

Q. And to have witnesses subpoenaed in your own behalf?

A. Yes.

Q. You are thoroughly familiar with the nature of the offense with which you are charged, are you?

A. Yes.

Q. Charged with murder, and you know what the penalty for that offense is?

A. Yes.

Q. And are you ready to be arraigned at this time?

A. [by the attorney] Yes, Your Honor.

Then following the reading of the information against appellant the judge continued to question and appellant answered as follows:

Q. You have heard this Information?

A. Yes.

Q. Do you understand it thoroughly?

A. Yes, I do.

Q. And are you ready to enter your plea to it at this time - or do you want to enter your plea now?

A. Yes.

Q. And what is your plea - guilty or not guilty?

A. Guilty.

* * *

The record also discloses that appellant had the means of employing a lawyer, that the lawyer who appeared for him had previously represented him in civil matters, that appellant and the attorney had conferred several times between the arrest and the judgment and that the attorney appeared not as a court appointed attorney but by appellant's own arrangement; also that appellant had previous court experience in criminal matters; . . .

* * *

Judging from the record here set out it would be hard to conceive how a court passing judgment could deal more fairly with a defendant or more considerately with the rights of one accused of crime.

* * *

> Where, as in this case, a defendant seeks not to supply an omission in or establish an inconsistency with the original record but to directly contradict it, this burden is heavy. Centers v. Sanford, 5 Cir., 120 F. 2d 217. According to the findings of the circuit court, appellant failed to carry the burden; and the record amply supports the findings that appellant was fairly and competently represented by counsel and was fully advised of all his rights.

This writer offers one last argument in support of the conduct of counsel, Walter Aaberg. The State of South Dakota had at the time of this murder, and still does, the death penalty. In the opinion of this writer, it would be good judgment to offer a plea of guilty for life imprisonment in any case where there was better than a 50-50 chance of getting the electric chair by going to trial. I suspect very seriously that this is the problem that confronted Parker and his counsel, Walter Aaberg, back in 1950 and who is to say that they didn't make the right decision. In the *Beto* case, supra, the Court said: "lawyers are not required to be infallible."

CONCLUSION

It is respectfully requested of this Court that the Judgment and Order of the United States Circuit Court of Appeals, Eighth Circuit, be affirmed and the application of Petitioner for a Writ of Certiorari be denied.

Respectfully submitted,

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PROOF OF SERVICE

WALTER W. ANDRE, one of the attorneys for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 13th day of May, 1970, I served copies of the foregoing Respondents' Brief in Opposition to the Petition for a Writ of Certiorari, upon Gary J. Pashby, attorney for Petitioner at his address: 355 Boyce Building, Sioux Falls, South Dakota 57102, by mailing copies of said Respondents' Brief duly addressed to him with the proper postage prepaid.

Walter W. Andre

WALTER W. ANDRE, one of the
Attorneys for Respondents